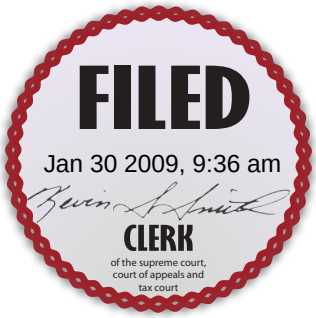

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IN THE
COURT OF APPEALS OF INDIANA

DWIGHT WILCOXSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0808-CR-755
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa F. Borges, Judge
Cause No. 49F15-0711-FD-238465

January 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Dwight Wilcoxson appeals his conviction for Class D felony counterfeiting. We affirm.

Issues

The restated issues before us are:

I. whether the trial court properly refused to give certain jury instructions tendered by Wilcoxson; and

II. whether the trial court properly responded to the jury's request during deliberations for additional legal instruction.

Facts

The evidence most favorable to the conviction is that on November 4, 2007, an Indianapolis Metropolitan Police Department officer pulled over a vehicle for speeding; Wilcoxson was the only back seat passenger. After learning that the driver of the vehicle had an outstanding arrest warrant from Georgia, officers removed the occupants from the vehicle and performed an inventory search of it. In a pocket behind the driver's seat, police found a green folder that contained tickets for that day's football game between the Indianapolis Colts and New England Patriots, tickets for other sporting events in other locations, such as North Carolina and Georgia, and sporting event schedules. The folder also contained receipts of some kind with Wilcoxson's name on them. Police also found a bag in the rear of the vehicle that Wilcoxson said was his. In that bag were more tickets for the Colts-Patriots game.

One of the officers on the scene previously had worked security at the RCA Dome and suspected that the Colts-Patriots tickets were counterfeit. After an RCA Dome ticket manager confirmed that the tickets were counterfeit, police Mirandized Wilcoxson and he gave a statement in which he said that he had come to Indianapolis to scalp tickets and admitted that he thought the tickets for the Colts-Patriots game "were bad." Tr. p. 230.

The State charged Wilcoxson with Class D felony counterfeiting. At the close of evidence, Wilcoxson requested that the trial court give an instruction regarding circumstantial evidence, and another stating that mere suspicion of guilt or conjecture is insufficient to support a conviction. The trial court refused both instructions. It also gave no instructions on the definition of "possession," as an element of counterfeiting.

During deliberations, the jury sent a question to the trial court asking, "Do we have a definition of possessed and possession?" Tr. p. 295. After discussing the matter with the prosecutor and counsel for Wilcoxson, the trial court brought the jury into court and read it part of a pattern instruction defining possession; it did not re-read the original instructions. Wilcoxson had objected to the language of this instruction, but did not request that the jury simultaneously be re-read all of the original instructions. After receiving this additional instruction, the jury found Wilcoxson guilty. He now appeals.

Analysis

I. Refusal to Give Instructions

We first address the trial court's refusal to give two jury instructions Wilcoxson requested. The purpose of jury instructions is to inform the jury of the law applicable to

the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Buckner v. State, 857 N.E.2d 1011, 1015 (Ind. Ct. App. 2006). Instructing the jury generally is within the trial court's discretion and we review its decisions only for an abuse of that discretion. Id. "Instructions are to be read together as a whole and we will not reverse for an instructional error unless the instructions, as a whole, mislead the jury." Id. A defendant is entitled to a reversal only if he or she demonstrates that an instructional error prejudiced his or her substantial rights. Id.

The first instruction the trial court refused to give stated, "You are instructed that where proof of guilt is by circumstantial evidence only, it must be so conclusive in character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable theory of innocence." App. p. 69. An instruction of this kind does not have to be given unless the evidence against the defendant is wholly circumstantial. Jackson v. State, 758 N.E.2d 1030, 1036 (Ind. Ct. App. 2001). Where there is direct evidence to support a conviction, a trial court is not required to give a jury instruction regarding circumstantial evidence. See id. at 1037.

Here, there was direct evidence to support Wilcoxson's conviction for counterfeiting. To support that conviction as charged, the State was required to prove that Wilcoxson knowingly possessed more than one counterfeit written instrument. See Ind. Code § 35-43-5-2(a)(2). Wilcoxson acknowledged to police that a bag in which many counterfeit Colts-Patriots tickets were found belonged to him, that he was in

Indianapolis to scalp tickets, and that he believed those tickets "were bad." Tr. p. 230. This is direct evidence that Wilcoxson knowingly possessed counterfeit written instruments. The trial court was not required to give a jury instruction on circumstantial evidence.

The second instruction Wilcoxson requested stated:

> Evidence which merely tends to establish suspicion of guilt, or evidence which tends to establish mere opportunity to commit the offense charged, is insufficient to sustain a conviction. A verdict based merely upon suspicion, opportunity, probability, conjecture, speculation and unreasonable inference of guilt gleaned from vague circumstances or evidence, is not sufficient.

App. p. 73. Although the trial court did not give this instruction, it did give a lengthy instruction regarding the State's need to prove Wilcoxson's guilt beyond a reasonable doubt and defining that phrase. Among other things, the instruction stated,

> A defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the defendant is probably guilty. . . .
>
> The State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance.
>
> If you find that there is a reasonable doubt that the defendant is guilty of the crime(s), you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration.

Id. at 61-62. This instruction adequately advised the jury of the need to find Wilcoxson guilty beyond a reasonable doubt and nothing less, such as mere suspicion or speculation. We cannot say the trial court abused its discretion in refusing Wilcoxson's instruction or, alternatively, that his substantial rights were prejudiced by that refusal.

II. Re-instructing the Jury During Deliberations

Next, we address Wilcoxson's argument that the trial court erred in responding to the jury's question during deliberations regarding a definition of "possessed" or "possession." In reading the jury an additional instruction regarding "possession," the trial court relied upon Indiana Code Section 34-36-1-6, which states:

> If, after the jury retires for deliberation:
>
> (1) there is a disagreement among the jurors as to any part of the testimony; or
>
> (2) the jury desires to be informed as to any point of law arising in the case;
>
> the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties.

This statute permits the trial court to give an additional jury instruction after deliberations have begun if it is discovered that there is a legal "lacuna," or gap, in the instructions that already were given. See Graves v. State, 714 N.E.2d 724, 726-27 (Ind. Ct. App. 1999).

We also held in Graves that it was reversible error for the trial court to give an additional, supplemental instruction without re-reading all of the original instructions.

See id. However, we did so only after specifically noting that the defendant had "strenuously objected . . . to providing an additional instruction without re-reading the entire set of final instructions." Id. at 726. Here, although Wilcoxson objected at length to the language of the supplemental instruction,[1] at no time did he ask that the trial court re-read all of the final instructions, nor did he object to the trial court's reading of only the supplemental instruction. Failure to object at trial constitutes waiver of review unless an error is fundamental. Absher v. State, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007). A party cannot sit idly by, permit the trial court to act in a claimed erroneous manner, and then attempt to take advantage of the alleged error at a later time. Robles v. State, 705 N.E.2d 183, 187 (Ind. Ct. App. 1998). Wilcoxson has waived his claim of error regarding the reading of the supplemental instruction only, and he makes no argument that the trial court's action constituted fundamental error.[2]

Wilcoxson also claims the trial court erred by only reading the supplemental instruction to the jury and not providing it with a printed copy of the instruction. However, Wilcoxson has waived this claim too. After reading the instruction, the following colloquy took place:

> [Prosecutor]: Is the jury going to get this in actual typewritten form?

[1] On appeal, Wilcoxson makes no argument regarding the language of the supplemental instruction.

[2] Because of this waiver, we need not consider whether the holding in Graves might be affected by the new Jury Rules that went into effect in 2003, which provide trial courts with greater leeway in facilitating the jury deliberation process. See Ronco v. State, 862 N.E.2d 257, 259 (Ind. 2007).

> [Court]: No, I'm just going to read it to them because in the, unless both parties requested it. If both parties request it, I'll do it but if either party objects to it I'm not going to because this says, "where the information required shall be given in the presence of or after notice to the parties or the attorneys representing the parties." So, because of that I thought I would read it to them and not send the written.
>
> [Defense counsel]: I would object, Judge.
>
> [Court]: I thought you might.

Tr. pp. 306-07 (emphasis added). Although Wilcoxson on appeal contends that he asked the trial court to provide a written copy of the instruction to the jury, our interpretation of this discussion is that he objected to the trial court doing so. Certainly, the trial court would have been justified in believing that Wilcoxson did not want the jury provided with a written copy of the instruction. We will not review this claimed error.

Conclusion

The trial court did not abuse its discretion in refusing to give Wilcoxson's tendered instructions. Wilcoxson has waived his claims of error with respect to the giving of the supplemental instruction during deliberations. We affirm.

Affirmed.

BAILEY, J., and MATHIAS, J., concur.